

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-1278

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1278

UNITED STATES OF AMERICA,

Appellee

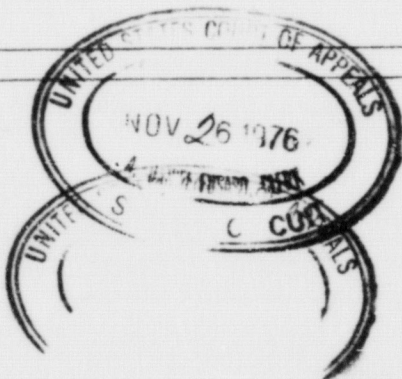
-against-

ROBERT L. VAN MEERBEKE and
DONALD M. JONES,

Appellants

Appeal from the United States District
Court for the Eastern District of New York

APPELLANTS JOINT APPENDIX



GUY L. HEINEMANN
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New York, New York 10025
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PAGINATION AS IN ORIGINAL COPY

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BUT:CEC:dmb
P.4751,771

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA

-against-

ROBERT L. VAN MEERDEKE and
DONALD M. JONES,

Defendants.
----- X

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 1st day of February 1975 and the 30th day of April 1975, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants ROBERT L. VAN MEERDEKE and DONALD M. JONES together with Reuben Rife named herein as a co-conspirator but not as a defendant, did knowingly and intentionally combine, conspire, confederate and agree to violate Section 952(a) and Section 960(a)(1) of Title 21, United States Code.

1. It was part of said conspiracy that the defendants would knowingly and intentionally import into the United States from places outside thereof, a quantity of opium, a Schedule II narcotic drug controlled substance.

2. It was further a part of said conspiracy that the defendants and others would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 963.)

1a
MAY 15 1975
TIME AM.....
PM.....
75CR 400
Cr.No.
(T.21,U.S.C., §§952(a),
960(a)(1), and 963;
Title 18,U.S.C., §2)

-2-

COUNT TWO

On or about the 14th day of April 1975, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendants ROBERT L. VAN MEERBEKE and DONALD M. JONES did knowingly and intentionally import into the United States from Calcutta, India approximately ten (10) pounds of opium, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Sections 952(a) and 960(a)(1) and Title 18, United States Code, Section 2.)

A TRUE BILL

Paul R. Givner
FOREMAN

David G. Frazier
DAVID G. FRAZIER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

A TRUE COPY		
ATTEST		
DATED	7/8	1975
LEWIS C. BELL		CLERK
BY	<i>Heidi</i>	DEPUTY CLERK

United States of America vs.

DEFENDANT

ROBERT L. VAN MEERBEKE

DOCKET NO.

75 CR 400

United States District Court for

Eastern District of NY

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
5 28 1976

COUNSEL

☐ WITHOUT COUNSEL

However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Guy Heinenmann Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY. counts 1 and 2

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S.C. Sec. 952(a) 960(a)(1) and 963; 18-2, in that on or about and between Feb. 1, 1975 And April 30, 1975, both dates being approximate and inclusive, the defendant, with another, did knowingly & intentionally conspire & import into the U.S. a quantity of opium and to conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities

SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 5 years plus a special parole term of 7 years on count 1 and sentence of 5 years plus a special parole term of 7 years on count 2 sentence in count 2 to run concurrent with sentence imposed in count 1. Stay execution of sentence to June 11, 1976 at 10:00 A.M. The defendant is to surrender to the United States Marshal in San Francisco, California.

BEST COPY AVAILABLE

SPECIAL
CONDITIONS
OF
PROBATION

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

CERTIFIED AS A TRUE COPY ON

THIS DATE 5/28/76

By *agusti*

() CLERK
() DEPUTY

Date

May 28, 1976

United States of America vs.

United States District Court for

4a

Eastern Dist. of KY

DEFENDANT

DONALD M. JONES

DOCKET NO. 75 CR 400

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
5 28 1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Barry Bohrer Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

FINDING &
JUDGMENT

There being a finding/verdict of
☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S.C. Secs. 952(a) 960(a)(1) and 963; T-18, U.S.C. Sec. 2, in that on or about and between Feb. 1 and April 30, 1975, both dates being approximate and inclusive, the defendant, with another, did knowingly and intentionally conspire to import into the U.S. a quantity of opium and to conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities

SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

2 years plus
a special parole term of 5 years on count 1 and sentence of 2 years plus
a special parole term of 5 years on count 2 sentence in count 2 to run
concurrent with sentence imposed in count 1. Stay execution of sentence
to June 11, 1976 at 10:00 A.M. The defendant is to surrender to the
United States Marshal in San Francisco California.

SPECIAL
CONDITIONS
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In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

Henry Bramwell

Date

May 25/1976

CERTIFIED AS A TRUE COPY ON

THIS DATE

5/28/76

By

() CLERK
() DEPUTY

ATTORNEYS

For U. S.: F 751,771 CLAYMAN

For VAN MEEBEKE:

Guy L. Heinemann

410 Park Avenue

NY NY 10022

753-1400

For Defendant: **IVAN-FISHER**

801-Broadway-

N.Y., N.Y. 975-8844

For DONALD M. JONES:

Barry Bohrer

410 Park Avenue
N.Y. N.Y.

355-2380

Did conspire to import narcotics into U" (Opium)

DATE	PROCEEDING
5-15-75	Before COSTANTINO J - Indictment filed ordered sealed by the Court. Bench Warrant Ordered /Issued.
'12/75	By JUDD, J.- Order filed that indictment be unsealed for the limited purpose of reproducing said indictment, and after reproduction is completed said indictment is to be resealed
6/19/75	Letter from A.U.S.A. Clayman dated 6/18/75 filed re:request that this indictment be consolidated with 75CR336 - Notation on bottom of letter from Judge Weinstein that matter is referred to Judge Mishler with suggestion that case be assigned to Judge Bramwell as related to 75CR336
6/20/75	Bench warrant retd and filed- executed
7/1/75	Magistrates file received from N.D.Ca and filed (placed on vault)
'14/75	Magistrates file received from S.D.Fa and filed

BOOK 400

6a...

DATE	PROCEEDINGS	CLERK'S FEE	
		PLAINTIFF	DEFENDANT
8-4-75	Before BRAMWELL, J - case called - sealed indictment ordered opened - defts present without counsel - defts arraigned and enter pleas of not guilty - defts to obtain their own counsel - bail contd - adjourned to August 5, 1975.		
8/5/75	Before BRAMWELL, J.- Case called- Defts and counsel I. Fisher present- Both defts waive all rights on conflict of interest being represented by one law firm-Bail of \$1,000.00 is vacated as to deft Jones and bail of \$25,000.00 Personal Bond is fixed-Bail cont'd as to deft Van Meerbeke- to Nov. 3, 1975 for trial		
8/5/75	Notice of Appearance filed.		
9-16-75	Govts Notice of Readiness for Trial filed		
11-3-75	Before BRAMWELL, J - case called & adj'd to Jan. 5, 1976 for trial		
1/5/76	Before BRAMWELL, J.- Case called- adj'd to 3/22/76 at 10:00 A.M. for trial on consent		
3-19-76	Before BRAMWELL, J - case called - motion to quash subpoena etc. motion argued - decision reserved.		
3-22-76	Before BRAMWELL, J.- Case called. Defts present. Guy L. Heinemann is substituted in place of Ivan Fisher as counsel for Van Meerbeke. Barry Bohrer is permitted to try this case at the request of deft Jones & granted by the Court. Case adj'd to 3-23-76 at 10 A.M. for trial.		
3-22-76	Notice of appearance for Meerbeke EXAMINED filed.		
3-22-76	Notice of appearance for Jones filed.		
3-23-76	Before BRAMWELL, J. - Case called. Defts & counsel present. Case adj'd to 3-24-76 at 10 A.M. for hearing. All witnesses must appear.		
3-24-76	Memorandum of William L. Osterhoudt filed.		
3-24-76	Before BRAMWELL, J - case called - deft & counsels present - Hearing to quash subpoena etc. begun - motion to quash subpoena is granted. Court Reporter is directed to seal transcript of this hearing - hearing concluded.		
3/24/76	Before BRAMWELL, J.- Case called- defts and counsel present- trial ordered and begun- jurors selected and sworn- trial contd to 3/25/76 at 10:00 A.M.		
3-25-76	Before Bramwell, J - case called - defts & counsels present - trial resumed - oral motion to quash subpoena as to Mr. Ullmann etc. motion denied ; deft Van Meerbeke motion to exclude prior similar acts etc. motion denied; deft Jones motion for severance motion denied; defts motion for mistrial motion denied - trial contd to 3-29-76 at 10:30 am		

CRIMINAL DOCKET

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DATE	PROCEEDINGS
3-29-76	Before BRAMWELL, J - case called - defts & attys present - trial resumed - Trial contd to 3-30-76 at 10:30 am.
3-30-76	Before BRAMWELL, J - case called - defts & attys present - trial resumed - motion to quash subpoena as to Jeffrey Ullman is denied; deft Von Meerbeke's motion for mistrial etc. motion denied - Govt rests - Trial contd to March 31, 1976.
3/31/76	Before BRAMWELL, J.- Case called- defts and counsel present- trial resume defts rests -defts motion for judgment of acquittal etc. - motions denied order of sustenance signed- defts motion for mistrial etc. - motion denied-jury retires to deliberate-jury returns and renders a verdict of guilty on counts 1 and 2 as to both defts- jury polled- jury discharged defts ordered to report to Probation Dept on 4/1/76 at 10:00 A.M.- trial continued xxx jury discharged
3/31/76	By BRAMWELL, J.- Order of sustenance filed
4-1-76	Before BRAMWELL, J - case called - defts & attys present - deft Jones released on \$10,000 personal bond - limits extended to Central and Northern Districts of Cal. Deft Van Meerbeke is released on \$25,000 personal bond - deft is to call the U.S. Probation pre trial office in Los Angeles, Cal. twice a week. Bail limits to Eastern Dist. of NY and extended to the whole State of Calif.
4-26-76	76 M 636 inserted in CR file -also 76 M 635 case called
5/28/76	Before BRAMWELL, J.-defts and counsel present- deft Van Meerbeke's motion for new trial- motion argued- motion denied- settle order on notice- deft VAN MEERBEKE sentenced to imprisonment for a period of 5 years plus a special parole term of 7 years on count 1 and sentence of 5 years plus a special parole term of 7 years on 2- sentence in count 2 to run concurrent with sentence imposed in count 1- bail pending appeal fixed at \$20,000.00 surety bond- stay execution of sentence to 6/11/76 at 10:00 A.M.- deft to surrender to U.S. Marshal in San Francisco, California - deft JONES sentenced to imprisonment for a period of 2 years plus a special parole term of 5 years on count 1 and sentence of 2 years plus a special parole term of 5 years on count 2- sentence in count 2 to run concurrent with sentence imposed in count 1- bail pending appeal fixed at \$5,000.00 surety bond-stay execution of sentence to 6/21/76 at 10:00 A.M.- deft to surrender to U.S. Marshal in San Francisco California-deft advised of his right to appeal
5/28/76	Judgment and Commitment filed-certified copies to Marshal(both defts)

DATE	PROCEEDINGS
5-28-76	Notice of motion filed for granting a new trial (Van Meerbeke & Memo of Law in support of motion filed) Notice of motion filed & Memo of Law for a new trial as to deft Jones)
6-2-76	Notice of appeal filed (Jones)
6-2-76	Docket entries and duplicate of Notice mailed to the Court of appeals.
6-2-76	Notice of appeal filed (Van Meerbeke)
6-2-76	Docket entries and duplicate of Notice mailed to the court of appeals
6/7/76	Certified copies of judgments and commitments ret'd and filed - deft to surrender to U.S. Marshal at San Francisco, Ca (both defts)
6/11/76	Before BRAMWELL, J. - Case called - motion for reduction of bail as to deft Van Meerbeke - application denied *
6-16-76	Notice of motion filed for authorizing payment for transcript of the trial etc. (Van Meerbeke) ret. June 25, 1976.
6-24-76	Copies of orders received from C of A that record be docketed by 7-22-76 filed.
6-25-76	Affidavit of ROBERT L. VAN MEERBEKE filed.
6-25-76	Before BRAMWELL, J - case called - defts motion authorizing payment for transcripts of trial - motion granted - Order signed.
6-28-76	Judgment & commitments ret'd and filed - defts. delivered to F.C.I. Terminal Island, Ca.
7-22-76	Record on appeal certified and mailed to the court of appeals.
7-22-76	Two stenographers transcripts filed (one dated Aug. 4, 1975 and one dated Aug. 5, 1975)
7-26-76	Letter filed dated July 23, 1976 from Douglas Kramer, Asst. US Atty; Memorandum of July 21, 1976 from Judge Bramwell; and Order releasing bail filed signed by Judge Bramwell which is vacated by the Court (see notation of Judge Bramwell on Order releasing bail stating pursuant to letter dated July 23, 1976, order is vacated by the Court - signed by Judge Bramwell on July 26, 1976 (all papers received from Chambers. (re deft DONALD M. JONES)
7-29-76	Acknowledgment received from the court of appeals filed for receipt of record on appeal.
8/1/76	Stenographers transcripts dated 8/4/75, 8/5/75, 3/22/76, 3/23/76, 3/24/76, 3/24/76, 3/25/76, 3/29/76, 3/30/76, 3/31/76, & 5/28/76 filed. (ROBERT L. VAN MEERBEKE & DONALD M. JONES).

Noted page

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DATE	PROCEEDING
10/7/76	Voucher for compensation for expert services filed. (ROBERT L. VAN MEERBEKE).
-18-76	Before Bramwell, J - case called - defts motion for extension of bail limits to Hawaii - motion granted - submit order (VAN MEERBEKE)
10-21-76	By BRANWELL, J - Order filed that the conditions of bail pending appeal are modified as follows: 1. The deft may travel to and reside in the State of Hawaii for the purposes of securing gainful employment and continue to report twice weekly as directed by the pre trial services agency for the Central District of California or elsewhere as that office directs. (Order dated Oct. 20, 1976) deft ROBERT L. VAN MEERBEKE.

the witness and not in his favor.

Does Mr. Bohrer wish to argue on this?

MR. HEINEMANN: Yes.

MR. BOHRER: Barry Bohrer, B-o-h-r-e-r,
for the defendant Donald Jones.

Your Honor, I join in the first thrust of
this motion for a hearing and new trial articulated
by Mr. Heinemann. I am going to present the
second thrust of the argument before the Court.

THE COURT: Let me ask you something. On
the second occasion he ingested opium, was that
when the defendant had called him as a witness?

MR. BOHRER: No. That was on Monday. I
believe I had started my cross-examination the
morning, we had a luncheon recess, and as your
Honor and the jury was reentering the courtroom--

THE COURT: There was a small piece of
opium on the--

MR. BOHRER: We disagreed on how big the
piece was. I couldn't even describe it, but about
that large, a fairly large piece of opium.

THE COURT: What do you mean by about that
large?

MR. BOHRER: Let's say a half inch in

diameter.

THE COURT: I will hear what you have to say, I see.

MR. BOHRER: So the thrust of this part of the motion, your Honor, on that Thursday, we are talking about the first day Mr. Fife was on the witness stand, he ingested some opium unbeknownst to the defendant and counsel and unbeknownst to Mr. Kramer.

When we did see him take opium on the following Monday we approached the bench and your Honor informed us you had seen Mr. Fife taking the opium on the previous Thursday and in fact it was your impression some of the jurors had seen Mr. Fife taking the opium also.

In spite of that your Honor did not inform any of the parties and did not make any statement to the jury at that time, and it was only until three or four days later, the Monday we saw Mr. Fife taking the opium, when this came to light.

The thrust of this is as follows: Improper communication, private communication between jurors and third parties, and jurors and a judge, and jurors and a witness--

THE COURT: Was there an improper communication between the jury and the judge?

(No response.)

THE COURT: Was there an improper communication between the jury and the judge?

(No response.)

THE COURT: I am asking you a question.

MR. BOHRER: I am saying we are calling for a hearing to see--

THE COURT: I am asking you a question and I want an answer.

Was there an improper communication between a juror and a judge?

MR. BOHRER: I am saying that any jurors, your Honor, who saw your Honor see Mr. Fife take the opium--

THE COURT: They can't say what I see. Either they are looking at me or looking at him.

MR. BOHRER: At side bar you said you saw some of the jurors see Mr. Fife taking the opium.

THE COURT: I said they may have seen him, they may have seen him. He is right there next to them. It doesn't necessarily mean I saw him. I said he was right there in front.

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MR. BOHRER: Your Honor said or represented to us they may have seen.

THE COURT: Definitely.

MR. BOHRER: And they may have seen your Honor look at Mr. Fife and--

THE COURT: I can only look at one thing.

MR. BOHRER: Both are in the line of sight, your Honor.

If the jurors were aware of the fact that your Honor saw Mr. Fife take the opium and did nothing about it, did not tell counsel and did not tell the jury or make some kind of admonitory instruction--

THE COURT: They couldn't be aware of this.

MR. BOHRER: We are calling for a hearing to determine that, your Honor.

THE COURT: For a hearing of the witness or the jurors?

MR. BOHRER: For a hearing as to whether or not the jurors were aware that your Honor observed Mr. Fife taking the opium.

If that's the case, and you made no statement to either counsel or the jury implicitly those jurors who saw this event might see or think

that your Honor was condoning the witness' demeanor and the witness' actions.

THE COURT: I had nothing to do with it. I didn't bring him here. He was a witness for the Government. And I didn't condone that just like I didn't condone any other thing that came out in this trial. I didn't condone it.

MR. BOHRER: I understand.

The jury may have the impression that this kind of thing is being condoned.

THE COURT: Did you argue this to the jury in your closing statements?

MR. BOHRER: We certainly did.

THE COURT: Both of you did.

MR. BOHRER: We certainly did.

THE COURT: And the jury knows all about it.

MR. BOHRER: And the jury also knows--I am not saying they know. We are asking for a hearing to determine whether or not they were aware that your Honor had seen this event and had not informed counsel and not informed the jurors.

THE COURT: Didn't I instruct the jury in my charge that they were not to take any impression

from the Court whatsoever?

MR. BOHRER: You may well have.

THE COURT: Do you want me to read it to you?

MR. BOHRER: I am sure you did, your Honor.

THE COURT: I know I did.

MR. BOHRER: I am sure you did. But this was well after the events took place and the impressions may have settled in their mind. A communication with the jury unbeknownst to defense counsel or the defendants is deemed to be presumptively prejudicial, your Honor.

THE COURT: You tell me in what way I communicated to the jury.

MR. BOHRER: I am not saying it was a direct communication.

THE COURT: Tell me. Put it on the record.

MR. BOHRER: I am putting it on the record.

It may have been, it may have been an implicit communication. Here is a juror sitting in the witness stand.

THE COURT: And didn't I instruct them that they were to disregard anything that I may have done?

MR. BOHRER: The instructions of that nature

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reach a point beyond which sometimes they have no effect, your Honor.

THE COURT: Is that what you say the case is here?

MR. BOHRER: I am saying if I were a juror-- a hypothetical case--if I were a juror who saw Mr. Fife take the opium and noticed that you saw Mr. Fife take the opium and yet your Honor did not advise the defendants, did not advise anyone until four days later when you finally saw him do it, I might think, I might think--and this has no reflection on your Honor, this has a reflection on what the juror sitting in the box may think-- that this behavior, that this behavior was being condoned, was being overlooked to a certain extent and that the Court may have been approving in an implicit way, in a very subtle way. Of course, your Honor was very fair.

THE COURT: It happened so fast I don't think there was any opportunity for anybody to say anything. Are you aware of that? He just grabbed it and put it in his mouth and that was it, it was gone.

MR. BOHRER: But your Honor was aware of it, as you told us, on Monday.

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THE COURT: Yes. It happened so fast. What chance did I have to say anything? It was over.

MR. BOHRER: We submit it was over, but your Honor may have said--

THE COURT: I left it for you and Mr. Heinemann to tell them and you did an excellent job.

MR. BOHRER: Thank you, your Honor.

THE COURT: You went all through it. You did an excellent job.

MR. BOHRER: Mr. Heinemann and I submit the moment is lost in spite of the fact that--and I thank your Honor for the compliment that we may have done an excellent job--

THE COURT: You did a very excellent job all through the trial, and the record speaks for itself.

MR. BOHRER: Thank you.

And the moment was lost, your Honor; the moment for an instruction to the jury, the moment for the Court to bring its influence to bear is the moment the opium was taken on Thursday.

And absent any such statement by the Court, we are saying that was an implicit communication--

not that it was, it may have been. And a hearing was required to determine whether or not any of the jurors saw this event in the first place, and whether any of the jurors saw that your Honor saw this in the second place, and what was the effect of this if the jury was sitting there and was aware your Honor was a witness to the event and yet didn't say anything. They may have the impression that this is all right, maybe this is what goes on in criminal trials all the time.

The implication was, and the defendants had no chance--Mr. Fife was a friend of the defendants. Mr. Fife was an alleged confederate of the defendants. The spillover effect of this pitiable person sitting on a witness stand eating opium, the very opium they are charged with smuggling into the country, the prejudice inherent in that I think is obvious. And the case law is to the effect that any communication, whether direct or indirect--and it certainly wasn't direct in this case, I am arguing this communication was indirect--

THE COURT: This is the approach you have taken all through the trial and I can't agree with

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you that I made any communication to that jury. All I did was sit there. That's all I did. And I have--I totally disagree with you that there was any communication by the Court in that instance. I totally disagree.

MR. BOHRER: Again, your Honor, I hope you don't misunderstand that you communicated in any bodily language.

THE COURT: I understand fully, I understand fully. Go right ahead.

MR. BOHRER: That is the thrust and the basis of the motion, your Honor. We are asking for a hearing at which the Government would have the burden of proof and there are Second Circuit cases to this regard--the Government has the burden of proof in establishing that any prejudice arising from this incident, from this communication was harmless to the defendant. They bear this burden and we ask for a hearing to determine that issue.

THE COURT: All right.

I will hear Mr. Kramer.

MR. KRAMER: Thank you, your Honor.

Not cited in any of the papers that the defendant put forward is Rule 601 of the Federal

The Court charged the jury that they could consider the fact that Fife "consumed a small amount of opium during the time he testified before you". (Tr. 648) (Emphasis added) Of course, it is entirely unclear how severe a dosage comes from a piece of raw opium of any size. It is for this reason that a lay opinion, even the trial judge's opinion, is insufficient to insure that the drug has not affected the witness' mind. This factor, combined with the interjections by the trial judge which interrupted and undermined counsel's argument and cross-examination, require a reversal of the convictions below.

CONCLUSION

FOR THE FOREGOING REASONS, THE CONVICTIONS SHOULD BE REVERSED AND THE APPELLANTS GRANTED A NEW TRIAL.

Respectfully submitted,

GUY L. HEINEMANN
Attorney for Appellant,
Robert L. Van Meerbeke
410 Park Avenue
New York, New York 10022
(212) 753-1400

BARRY A. BOHRER
Attorney for Appellant,
Donald M. Jones
IVAN S. FISHER
410 Park Avenue
New York, New York 10022
(212) 355-2380

Dated: December 6, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 76-1278

UNITED STATES OF AMERICA,

Plaintiff

against

AFFIDAVIT OF SERVICE
BY MAIL

ROBERT L. VAN MEERBEKE and
DONALD M. JONES,

Defendants-
Appellants

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 69-84 137th Street,
Flushing, N.Y. 11367

That on the sixth day of December

1976 deponent served the annexed

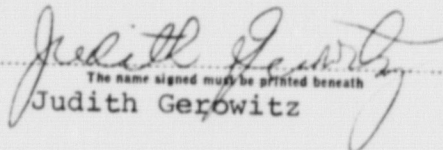
JOINT REPLY BRIEF

on Douglas J. Kramer, Assistant United States Attorney
attorney(s) for United States of America
in this action at 225 Cadman Plaza East, Brooklyn, N.Y. 11201
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care
and custody of the United States post office department within the State of New York.

Sworn to before me

this 6th day of December,

1976


The name signed must be printed beneath
Judith Gerowitz

JEFFREY L. ULLMAN
Notary Public, State of New York
No. 24-4623548
Qualified in Kings County
Commission Expires March 30, 1977

RECEIVED
U.S. ATTORNEY

Nov 26 4 22 PM '76

EAST. DIST. N. Y.

J. C. Smith